No. 16116

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ROSE WONG and KENT WONG,
Appellants,

WALTER SWIER and LAURA SWIER,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

BRIEF OF APPELLEES

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JURISDICTION

This is an action by appellants, plaintiffs below, residents and citizens of the State of Idaho, against appellees, defendants Swier below, residents of the State of Washington, for damages sustained by plaintiff Rose Wong, while in the employ of said defendants, as a result of a fall from a ladder furnished to her by them in such employment (R. 21-22). Jurisdiction of the trial court was

invoked by reason of diversity of citizenship between the parties in accordance with USCA, Title 28, Sec. 1332. Jurisdiction of this court in invoked by reason of USCA, Title 28, Sec. 1291.

Judgment in the court below was entered March 28, 1958 (R. 35). Motion to set aside verdict and judgment and to enter judgment for plaintiff, or in the alternative for a new trial, was filed April 4, 1958 (R. 36-38), and this motion was denied May 28, 1958 (R. 46-47). Notice of appeal was filed June 16, 1958 (R. 47), and cost bond was filed June 16, 1958 (R. 48-49).

STATEMENT OF THE CASE

Appellants in their statement of the case have omitted many relevant and material facts, which appellees deem necessary to state, and appellants have also left a number of inaccurate impressions, which should be corrected, in order that this court may more easily view this case fully and accurately. Therefore, appellees deem it necessary to make their own statement of the case, which is set out under subheadings, so that the various matters involved in this case may be more easily and quickly understood, as follows.

Background of Relationship Between Appellants and Appellees and Omissions in Appellants' Statement Concerning Themselves

Since appellants have dwelt upon the above subject in their opening brief and left erroneous impressions concerning the same, appellees have been constrained to

correct such impressions and, since appellants went into such background and their status, to supply their omissions.

The Swiers were intimately acquainted with the Wongs, having known Rose Wong 12 or 13 years before her husband (R. 55), he being a Chinese man (R. 85). She was then a missionary in China and came back and made her home on the Swier ranch (R. 55). The acquaintance started as a religious and sympathetic one, as Mrs. Wong needed a home and the Swiers provided a home for her (R. 55). Mrs. Wong mentioned that she had resided in the same tenant house on the Swier ranch before to assist them in religious work (R. 129) and acknowledged that she had become acquainted with Mr. and Mrs. Swier through missionary work (R. 110). According to Mrs. Swier, Mrs. Wong had been a missionary friend of theirs for many years and a personal friend for the last 13 years before the trial (R. 307).

Mr. and Mrs. Wong came to the Swier ranch in June, 1955, to make their home there (R. 110, 307), and the Wong family continued to reside on the Swier ranch, in the same tenant house, with the Wong children sleeping in the Swier home, until June, 1956 (R. 253). No rent was ever asked, suggested or contemplated (R. 127-128, 258).

During the time that Mr. and Mrs. Wong were at the Swiers', which was from June, 1955 (R. 110), they were

busy helping Mr. and Mrs. Swier carry on Sunday school work in Cowiche, Washington (R. 136), where the Swiers lived. They even stayed in Cowiche until the first of August, 1957 (R. 137), when they moved back to Portland, Oregon, having left there in June, 1955, to live at the Swiers' (R. 110).

Mrs. Wong was injured October 17, 1955 (R. 24), and Mrs. Swier visited her every day in the hospital for the first month and quite often thereafter (R. 308), and the Swiers had the Wong family for Christmas Day, 1955, and gave them their Christmas dinner (R. 308). After the Wongs moved back to Portland, plaintiff Rose Wong corresponded with defendant Laura A. Swier, addressing her as "Dear Sister Swier" (R. 195, Ex. 19).

Two years before the Wongs arrived at the Swier ranch in June, 1955, the elder Wong son had made his home with the Swiers in the summer of 1953 (R. 252). In the fall of 1954 this boy and the two eldest Wong girls came to live with the Swiers and continued to sleep in the Swiers' own house even after their parents' arrival in June, 1955. For 8 months prior to their parents' arrival the Swiers had been taking care of these three children (R. 111, 112, 134, 253). According to Mr. Swier this care was gratis (R. 258-259).

Appellants' situation, when they came to the Swiers' in June, 1955, was that they were penniless, had no contract of any kind to go out in the missionary field, and

depended upon the Swiers for their livelihood (R. 136-137, 258-259). There had been some sort of a settlement of a previous contract to do missionary work, but Mrs. Wong refused to divulge what the settlement was (R. 134).

After the Wongs moved back to Portland, they were able to pursue their former work, as they carried on bible studies in their home, which was after the accident, and they were offered regular services for the Open Bible Church at Portland (Ex. 19).

No Tampering or Change in the Ladder

Exhibt 1 is the ladder which was furnished to appellant Rose Wong at the outset of apple picking in the fall of 1955 (R. 56, 254-255). This is a 10-foot ladder (R. 256, Ex. 1). She used this ladder every day, picking apples, during the course of apple picking, which was 8 or 10 days up to the date of the accident (R. 116-117, 255), every day from 8:00 A. M. to 5:00 P. M. with one hour out for lunch (R. 116-117, 255), and all that period of time she used the ladder in question (R. 255, Ex. 1), which is uncontradicted.

After said appellant's fall from the ladder, which was October 17, 1955, about 11:00 A. M. (R. 118), the ladder was taken to Dependable Ladder Company, Yakima, Washington, for safe-keeping (R. 197, 272, 279), where it was kept until the time of the trial and then was placed in custodia legis (R. 347-351). The ladder had been in

dry storage at Dependable Ladder Company for over 2 years as of the time of the trial (R. 197).

It is appellants' contention that between Friday preceding the commencement of the trial on the following Monday and the day that the ladder was admitted into evidence during the trial, it was tampered with (Opening Brief of Appellants 18-19).

Robert I. Bounds, who, with Mr. Splawn, brought the ladder, the morning of the trial, from Dependable Ladder Company to the courtroom, at the instance of appellants' counsel, testified that the ladder, when picked up that morning, was in the identical place and position at Dependable Ladder Company as it was when appellants' counsel inspected it the Friday before the trial, that it was brought directly to the courtroom, that nothing further was done to the ladder, and that they left together after it was placed in the courtroom (R. 347-351).

Herbert Rossow, an expert witness for appellees and the owner and operator of Dependable Ladder Company, where the ladder was stored for 2 years immediately preceding the trial (R. 197) and in whose care it had been (R. 279), a manufacturer and repairer of orchard ladders, step ladders and all kinds of ladders (R. 270-271), who had been in the ladder business 6 years (R. 272), had become familiar with the ladder in question (R. 272), which had been brought to his place of business to be kept (R. 272).

While the ladder was there, he had inspected and tested it (R. 273). When it was brought in, he checked it over (R. 274). When appellants' counsel made their first inspection of it about a year before the trial, he attended that inspection (R. 274), whereat the ladder was laid horizontally on a table, with the tongue lying in the center of the ladder, and then at the bottom of the ladder the end of the tongue was moved to one side and then to the other, and the arc or play at the bottom was approximately 4 inches from the center to one side and not so much from the center to the other side (R. 274-275). He inspected the ladder himself on this occasion and examination and loaned his ruler to Mr. Hudson, of appellants' counsel, to measure the arc or width of play of the tongue at the bottom of the ladder (R. 274-275). He observed Mr. Hudson's measurement of that arc and it was 4 inches (R. 275). The over-all radius of the arc or play on both sides of the center was about 6 inches (R. 281).

This witness examined the ladder in the courtroom, testing it for its play or looseness (R. 274), which was the fourth day of the trial, and testified that he could not find any change in it (R. 275), stating that he had seen the ladder practically every day for the past year in his warehouse and that, although it had been moved around in the warehouse, he could not find any change in it (R. 275).

With respect to the washers at the top, at the bolts, he testified that there were two washers on one side and one on the other side and that those washers were there when the ladder was brought into his shop (R. 275-276).

He testified that he was present on the respective occasions when Messrs. Brazil, Hovde and Clark examined and tested the ladder, who were expert witnesses for appellees, which occasions were at Dependable Ladder Company (R. 276) and that the ladder in the courtroom was in the same condition as it was then (R. 277).

He also testified that the ladder had been in his care ever since it had been brought to his warehouse (R. 279), and on re-direct examination that, with respect to the over-all play of the tongue, there was no difference from what it was on the occasion when appellants' counsel examined it a year before or on any other occasion when he had examined it (R. 282) and that he could not see where the ladder was changed in any way, shape or form from the way it was the day it was brought into his warehouse (R. 282).

Louis C. Moritz, an expert witness for appellees, testified that he thoroughly examined and tested the ladder at Dependable Ladder Company approximately 3 weeks before the trial (R. 285-288), and he examined it in the courtroom the day he testified, which was the fourth day of the trial, particularly with respect to the play in the tongue from the looseness at the hinge and he then testi-

fied that the ladder was no different from what it was before (R. 285-289, 291-294).

David Swier, an adopted son of appellees, employed on their ranch when appellant Rose Wong was injured (R. 300), prepared the ladders, including this one, on the Swier ranch, for the apple harvest in the fall of 1955 (R. 304). He is the one who put the washers on the bolts at the top of this ladder, when he prepared the same that fall (R. 304).

While the ladder was still at the ranch and after appellant Rose Wong fell off it and before it was taken to Dependable Ladder Company to be kept, this witness examined the ladder (R. 303). From that time to the fourth day of the trial, when he testified, he had not had an opportunity to examine the ladder again (R. 303). He examined the ladder in the courtroom, particularly the looseness or play in the tongue, the assembly at the top, and the bolts and nuts thereat (R. 304), and there was nothing about the ladder different from the way it was when it was on the ranch, before it left the ranch (R. 304).

Appellee Walter Swier examined the ladder in the winter of 1955, after the fall, together with Mr. Wong (R. 263) and moved the tongue laterally, at the bottom of the ladder, and its arc was 3 inches one way and 4 inches the other, from the center of the ladder, with the ladder lying flat and the tongue on top (R. 264, 294-295), which was not contradicted by Mr. Wong when he testi-

fied. Mr. Swier measured it with a steel rule and Mr. Wong was with him (R. 294).

During the course of the trial Mr. Swier tested the ladder and he could see no appreciable difference whatever (R. 295) and described the ladder at the trial as being identical with the way it was before, including the play (R. 295).

Appellants' counsel, Miss Loveland and Messrs. Hudson and Mullins, testified, which testimony is referred to in the Opening Brief of Appellants at page 19, and in this connection perhaps it should be mentioned that Miss Loveland is a sister of appellant Rose Wong (R. 268), that Mr. Hudson testified that he had no financial interest in the case (R. 317-318), and that neither they nor Mr. Mullins recorded in any manner any measurements taken (R. 332).

It is interesting to note that there is a total absence of any testimony or other evidence as to who, if anyone, might have tampered with the ladder and that it could be to appellants' advantage, just as much as to appellees', to have it tampered with, if there were any advantage at all. Appellees' counsel stated in the trial judge's chambers, at the proceedings which occurred there (R. 218), that the ladder had not been tampered with at all and that he was informed that the measurement of the arc of play was the same (R. 218-219), so the remark attributed to him at page 30 of the Opening Brief of Appellants is

brought out of the context of the entire discussions and a full examination of the immediate context reveals that it relates to an assumption made by the court for the purpose of a demonstration by the witness Clark.

Safeness of the Ladder

Cecil C. Clark, an expert witness for appellees, who estimated that he had actually spent 10,000 hours on orchard ladders, having devoted 40 years of his life to orcharding and the handling of ladders (R. 198) and at the time of the trial operated 321 fruit picking ladders and estimated he had borrowed in the past 1,000 or more (R. 199), testified that the ladder in question (Ex. 1) was much better than the average ladder used in the Yakima Valley, including all its aspects as it stood in the courtroom (R. 205); that a picker on that ladder, in order to fall, had to do one of two things: (1) place the ladder improperly, set it up wrong or (2) lean too far out (R. 206-207); that he had fallen off ladders a number of times just simply because of reaching out too far to get the last fruit, without getting down and moving the ladder (R. 207); that reaching out too far will nearly always make a ladder tip over and the other cause is improper setting (R. 207); that the condition at the top of the ladder would make no difference with a person standing on any step, clear to the tenth (R. 207); that he was perfectly satisfied that the ladder was safe (R. 208) — the ladder as it stood right there in the courtroom (R. 209); that you can stand a ladder up, used or new, with no one on it, and

push in on one side and cramp the ladder (R. 209); that a new ladder would be no better than the ladder in question to pick on (R. 209); that, if you get the top all tight and everything tight, a ladder is more apt to tip over, because, if it is loose, it will absorb movement and, if it is tight, it will twist when a picker leans and over it will go (R. 209-210); that, if one stood on any rung of the particular ladder, including the top, and did not reach out unduly or not over-balance, there could not possibly be any action occur anywhere in the ladder, including any action at the very top and the assembly at the top, that would cause the ladder to tip, collapse, fall to one side or to move in any direction, if the ladder were properly set (R. 210); that, if a picker has the ladder set off balance, then it could go down (R. 210) and that such was true of brand new ladders as well (R. 210); that, although the ladder had ben in dry storage for over 2 years, it was still tight, that there was not excess movement in the top, and that it was in first-class condition and satisfactory to pick on (R. 211).

This winess was then given a hypothetical question embodying exactly, no more and no less, what appellant Rose Wong said she did with and on the ladder at the time of the accident, viz., (1) the ladder was set solidly on disced ground, (2) the tongue was centered and placed properly, (3) she was standing on the eighth rung from the bottom, (4) not climbing up or down or moving her

feet, (5) only turning the trunk of her body slightly to the right while so positioned, in order to ease off the pressure of the picking bag approximately half full of Delicious apples from the ladder, preparatory to come down, but neither foot being taken off to come down, and (6) the ladder tipped over (R. 103-104, 119-125, 211- 212).

Mr. Clark answered that the ladder would not move any at all, that it could not collapse, twist or do anything, and that he was referring to the identical ladder in question (R. 212).

He further testified that, if it were properly set, then the only thing which could cause it to tip would be leaning too far, reaching for those apples one ought to re-set the ladder to get, and that normal turning and moving around on the ladder, including turning to bring a bag of apples down, would cause no movement or trouble of the ladder whatever (R. 212).

On cross-examination Mr. Clark testified that he had inspected the ladder in the courtroom just before his testimony (R. 222); that a hole in a hinge much larger than the bolt would not tend to give more opportunity for the ladder to twist at the top, with a person standing on the ladder (R. 224); that the larger diameter of the hole and the looseness of the connection would make no difference (R. 224); that, in fact, you could put sixteen-penny nails in there, set the ladder up and get it centered properly and use the ladder and it would be just as safe, because

the weight of the picker is against the bearing and it will not shift (R. 224).

Further, on cross-examination, he testified that standard ladders are only used, there not being ladders to suit each person's individuality and idiosyncracies (R. 226).

On re-direct examination this witness testified that dexterity or lack of dexterity of a picker would have no effect upon the ladder, that it was just as safe for a solid person as a wiry person or for a person who was stiff as one who could swivel easily (R. 229).

C. A. Brazil, an expert witness for appellees, testified that he had examined the ladder and its various features before the trial (R. 234); that he had found some play in the tongue of the ladder at the top assembly (R. 234); that the ladder in its condition was one in common use in the Yakima Valley (R. 235, 237); that the play or looseness referred to at the top—that that feature—would have no effect upon the safety of the ladder for apple picking purposes (R. 235); and that the explanation for that statement is that (1) it is necessary to have some play in the top of the tongue (R. 235), (2) if a person climbed up the particular ladder and even completely to the top and the ladder is properly set, the play or looseness referred to can have no effect to cause the ladder to tip or collapse or go in any direction (R. 236) and that he could not see how the ladder could tip over if it were properly set (R. 236), (3) in order to make the ladder tip over it would

probably require a reaching out beyond the reach of a person on the ladder, in other words, to stretch out to a point where the weight of the body is way off the center of the ladder (R. 237), and (4) a person's dexterity on the ladder, if it is properly set, would be no factor, i.e., the safeness of the ladder would not vary with the build or dexterity of the pickers using it (R. 237).

On cross examination he testified that a little bolt going through a big hole at the hinge at the top of the ladder would not provide more opportunity for the ladder to twist and become unbalanced, that it would not affect it, and that it would make no difference in the stability of the ladder (R. 240).

Also, this witness further testified that the looseness at the hinge of the particular ladder was not unusual in respect of ladders in common use in the Yakima Valley (R. 240); that, if the ladder were properly set and the tongue was straight forward when the ladder was being used, the play in the hinge would have no effect upon any twisting or moving of the ladder (R. 241); that you can take a brand new ladder that has never been used and is absolutely rigid at the top, i.e., at the hinge, and set it on a floor or any surface and you can press in on one leg and cramp it or put it into a torque just as easily as with a used one, such as the ladder in question (R. 241).

On recross examination this witness further testified

that the looseness at the hinge did not detract from the safety of the ladder (R. 242).

Ben Hovde, an expert witness for appellees, characterized the ladder as average or above average compared with the ladders in common use in the Yakima Valley (R. 245); that the looseness at the top or any amount thereof would have no effect upon the stability or safety of the ladder, if the ladder were properly set (R. 245); and that it was absolutely a normal ladder, which most all farmers used, and was good and solid (R. 245).

He was then asked a hypothetical question embodying exactly, no more and no less, what appellant Rose Wong said she did with and on the ladder at the time of the accident, and he answered that the looseness or play at the top or any amount of looseness there would have no effect so as to cause the ladder to tip, sway or collapse and that, if the ladder were set properly, as she said that she did, it would not move unless one leaned too far (R. 245-246).

On cross examination he testified that longitudinal cracks on a leg of the ladder would have no effect upon the strength thereof and would not affect it so it would twist (R. 246-247); that the hole in the hinge being larger than the bolt, with weight on the ladder, would make no difference (R. 249) and the looseness would have no effect to make the ladder twist (R. 250); and that the more rigid a ladder is, the easier it is to tip (R. 250).

Herbert Rossow, an expert witness for appellees, testified that he had examined and tested the ladder and the top part (R. 273); that the looseness at the top did not make any difference (R. 273); and that, if the ladder were properly set, explaining what was meant by such term, it did not make any difference how much looseness was in the top in respect of the safeness of the ladder (R. 277).

Louis C. Moritz, an expert witness for appellees, testified that he tested the ladder and found it to be safe (R. 287-288), which was approximately 3 weeks before the trial (R. 288).

He, too, was asked the same hypothetical question and answered that the ladder could not conceivably tip under the circummstances related by appellant Rose Wong (R. 289).

He testified that the ladder, if properly set, could not tip or collapse unless the picker got himself overbalanced (R. 289-291); that you can set up a ladder, center the tongue, and push on one side and make any ladder cramp (R. 290); that with weight on the ladder, such as Mrs. Wong, there is nothing to cause the ladder to tip or collapse or fall over because of any play or looseness at the top (R. 290); and that for ordinary picking activities there was nothing about the ladder to make it unsafe for ordinary picking purposes, including reaching for apples, putting them in a bag, and coming down (R. 291).

He also testified that, even if the ladder were looser at the hinge than it was, such still would definitely not make the ladder unsafe (R. 294).

Appellee Walter Swier's experience orcharding with orchard ladders had been all his lifetime, since about 1918, and in the Yakima Valley (R. 268-269). According to him, the condition of the ladder, at the time appellant fell, including the looseness and play, was average or better than average (R. 270).

Apple picking began on the Swier ranch, according to appellant Rose Wong, either the last of the first week in October, 1955, or the first of the second week (R. 116), and according to Mr. Swier it began 8 or 10 days before the date of the accident (R. 255).

By her own admission appellant Rose Wong understood about the setting of a ladder and the use of a ladder (R. 115), and there was no need to educate or teach her concerning the setting of a ladder for picking fruit (R. 115). She had learned to set a ladder properly and carefully (R. 115), and she could manipulate a ladder and could set it herself (R. 115).

During the course of apple picking up to the time of the accident, she set her own ladder (R. 117) and did not have anyone do it for her (R. 117). She did not pick her own trees entirely (R. 117), as she and her daughter were also picking on the tree where she was injured (R.

119, 340), and Mr. Swier observed that she picked with her husband, son and daughter (R. 256).

Mrs. Wong had previous experience picking from a ladder, as she had picked pears for the Swiers earlier that fall, in September, for approximately a week, picking every day (R. 114, 253), and in pear picking she used and handled her own ladder (R. 114, 253), moving it around each tree she picked and setting her own ladder (R. 114).

During the course of apple picking up to the time of the accident, she experienced no difficulty or trouble with respect to the ladder (R. 117, Ex. 1).

Mrs. Wong said that she never complained to Mr. Swier or anyone else about her ladder or anything concerning the ladder (R. 117) and that she would have had no reluctance or hesitancy to speak to him or to complain about the ladder, if there had been any reason to speak or to complain concerning it (R. 117-118). She said that, if she had observed a flaw in the ladder, she certainly would have told him (R. 346).

Mrs. Wong testified that during all the time she used the ladder she experienced nothing and observed nothing that indicated to her that the ladder was unsafe or that there was anything wrong with it (R. 346-347).

In the use of the ladder any looseness in the top as-

sembly did not manifest itself to her (R. 347) and she felt safe on it (R. 346-347).

When Mr. Swier furnished the ladder in question to the Wongs, he told them to report to him anything wrong with the ladder, and no report was ever made to him concerning this ladder or any other of the 4 ladders furnished to them (R. 295-296).

There was no sound of any play or looseness when she fell (R. 127).

According to Mr. Swier no complaint was ever made to him by either Mr. or Mrs. Wong about any lack of knowledge as to how to go about picking or to handle a ladder (R. 254-255).

Mr. Swier and his son, David, who was employed on the ranch, each season before picking, went over all the ladders to see if they were in shape to pick and did whatever was necessary to put them in such shape (R. 57), and such applied to the ladder in question (R. 58).

Appellant Rose Wong, describing the accident, said that she set the ladder carefully, testing it on both sides to see that it was well-balanced, and then ascended the ladder to the eighth rung (R. 103).

Neither Mr. nor Mrs. Wong, following the accident and during that winter, ever claimed that anything was wrong with the ladder (R. 266-267).

George Mullins, one of appellants' counsel, acknowledged that on March 15, 1958, the date of their first examination of the ladder, the expert witness, Herbert Rossow, stated that the ladder was perfectly safe (R. 333).

Qualifications of Appellees' Expert Witnesses

None of appellees' expert witnesses were acquainted with appellees or had any connection with them, or they with such witnesses, except Cecil C. Clark, whom Mr. Swier had met about a year and a half previously, but that was all except that they both belonged to Washington Canners' Coop. (R. 298-299).

All appellees' expert witnesses were exceedingly well qualified in their field and had achieved positions of distinction and honor (R. 233, 235-236, 198-202, 243-244, 283-284).

Their expert knowledge of apple-picking ladders also came from large experience throughout the Yakima Valley (R. 204, 233-235, 243, 270-272, 283-285), probably the largest apple-producing area in the West.

No objection was made to their qualifications and such were accepted except as to Cecil C. Clark (R. 203) and Herbert Rossow, the objection as to the latter being that he was only a manufacturer and repairer of orchard ladders (R. 277).

Causes of Appellant Rose Wong's Fall

There are many combinations of evidence as to what

caused said appellant to fall off the ladder, and from the total of such combinations, including all reasonable inferences, the jury could easily find sufficient basis for either contributory negligence, assumption of risk or unavoidable accident, as follows.

As to contributory negligence, the expert witness Clark testified, for instance, that in order to fall from the ladder in question a picker had to do one of two acts: (1) set the ladder improperly or (2) lean too far out (R. 206-207). The expert witness Brazil testified, for example, that in order for said ladder to tip over, it would probably require a reaching out beyond the reach of a person on the ladder, i.e., stretching out to a point where the weight of the body was far off the center of the ladder (R. 237). The expert witness Hovde testified, for example, that, if the ladder were set properly, as said appellant said that she did, it would not move unless one leaned too far (R. 245-246).

As to assumption of risk, the expert witness Moritz testified, for example, that an overbalance of the picker, which can happen to anyone and is a risk naturally and ordinarily incident to or inherent in the work which said appellant was doing, could cause the ladder to collapse (R. 290). Reaching out too far to get the last apples, which is human nature (R. 212), which is a natural incidence connected with the work of apple-picking (R. 207) or leaning over too far (R. 246), which is the most prob-

able act that might happen in apple-picking (R. 237), are also natural and incidental risks connected with apple-picking and a part of the hazards naturally incident to or connected with such type of work (R. 207, 212).

David Swier was picking about 3 rows from said appellant when she fell (R. 301). He rushed over and saw her lying on the ground (R. 260, 302) and the ladder was tipped, leaning against a limb, with the legs of the ladder on one side of a pile of boxes full of apples stacked 3 high and the tongue on the other side of the pile of boxes (R. 302-303), indicating that she had set her ladder over this pile of apple boxes. When he arrived where she was lying, she said "something about, something on the order of reaching too far and falling and striking her leg on the box" (R. 303). Walter Swier testified that, after appellant Rose Wong returned to his ranch from the hospital, the latter part of December, 1955, he asked her what had brought on her fall (R. 260-261) and that she replied that she did not know definitely but that as near as she could remember she had reached out for some apples as she was about to finish the tree (R. 262). Certainly the jury could visualize an overbalance of the picker and that it was a risk naturally and incidentally connected with apple-picking from a ladder.

The ladder was not broken (R. 260). Said appellant said that the orchard was irrigated by corrugations or ditches and that she was aware of that during the course of

the apple-picking (R. 117). The irrigation ditches or corrugations in the surface of the ground ran north and south (R. 259). The picking rows did not coincide with the irrigation ditches (R. 259). The ground at the place where the ladder was set, when the fall occurred, was disced (R. 259) and, according to said appellant, there was a softness because of the discing (R. 121). There was grass in the orchard and she could manipulate her own ladder unless the grass was unduly long (R. 116). She described her fall as, when she turned her body, there was a quick give of the ladder and that it went out from under her feet (R. 104). Certainly the jury could visualize that one or the other of the members of the ladder, i.e., either a leg or the tongue, went down in a soft spot or slipped on the grass, if the jury believed that there was no other cause. The jury could also visualize that one or the other of the members of the ladder slipped down the side of an irrigation ditch or corrugation, creating the sensation of a quick give and no sound, as she testified (R. 127), at the top of the ladder or anywhere else on the ladder, or any creaking, to indicate any play or looseness when it gave.

There lay before the jury a whole picture involving an apple orchard with a cover crop of grass, disced ground with a softness in it, irrigation ditches or corrugations running on a bias with the picking rows, the conformation of apple trees and the ladder itself, and what from common knowledge one has to do in order to utilize a ladder

to pick an apple tree, and the commonly known hazards there are to that type of work. As aptly stated, conditions are seldom ideal in an apple orchard (R. 228).

As to unavoidable accident, the jury could believe, as previously set out in appellees' statement of the case, that the ladder was perfectly safe, that said appellant properly set it, and that she did not incur any of the risks attached to apple-picking, as above referred to, so that the accident was plainly and simply an unavoidable one, purely accidental, without any negligence on the part of anyone and no assumption of risk. The testimony as to the safeness of the ladder combined with her own testimony would certainly raise a basis for unavoidable accident. An apple orchard and the picking of apples from a ladder pose many factual combinations as a matter of common knowledge, and also in this case there were many combinations of evidence and their reasonable inferences, as well as the ladder itself.

ARGUMENT

Appellees' argument is divided into 3 subheadings, the first dealing with specifications of error numbered 1, 2 and 3; the second dealing with specifications of error numbered 4(a), 4(b), 5 and 6; and the third dealing with specification of error numbered 7.

Appellants Not Entitled to Peremptory Instructions Directing Verdict or Finding as Matter of Law that Appellees Were Guilty of Tampering and that Their Case was Affected Thereby

An issue of fact clearly existed as to appellants' contention that the ladder had been tampered with and was changed, which issue is clearly pointed out in appellees' statement of the case, beginning at page 5 of this brief. Certainly it was not error to refuse to direct a verdict and to give appellants' proposed instructions numbered 20 and 21 in the form and content in which they were proposed.

Appellants argue that there was no issue of fact presented in the case as to their contention of tampering and change and, therefore, a directed verdict should have been made and said proposed instructions given, which are peremptory and assume as a matter of law appellants' contention.

It is argued by appellants that a presumption arose so that the court should have instructed as a matter of law upon the subject, since there was no evidence or inference to rebut such presumption. Appellants cite three Washington cases at pages 35 and 36 of their opening brief. The first case, *Anning v. Rothschild & Co.*, 130 Wash. 232, 226 Pac. 1013, cites and quotes from the second cited case, *Scarpelli v. Washington Water Power Co.*, 63 Wash. 18, 114 Pac. 870, as follows:

"A presumption is not evidence of anything, and only

> relates to a rule of law as to which party shall first go forward and produce evidence sustaining the matter in issue. A presumption will serve as and in the place of evidence in favor of one party or the other until *prima facie* evidence has been adduced by the opposite party; but the presumption should never be placed in the scale to be weighed as evidence. The presumption, when the opposite party has produced *prima facie* evidence, has spent its force and served its purpose, and the party then, in whose favor the presumption operated, must meet his opponents' *prima facie* evidence with evidence and not presumptions. A presumption is not evidence of a fact but purely a conclusion. Elliott Ev. §§ 91, 92, 93; Wigmore Ev., §§2490, 2491."

The third Washington case cited in appellants' opening brief, *Nicholson v. Neary*, 77 Wash. 294, 137 Pac. 492, sets forth the same rule.

It seems to appellees that appellants' argument upon their first three specifications of error is entirely unfounded in view of the evidence, to which this court has been referred in appellees' counter statement of the case. Also, appellants' proposed instructions are couched in such form and content that they are peremptory and are not conditioned upon the jury's first finding from the evidence the contended fact and then, if they so find, to treat such as evidentiary. In other words, this was a factual issue at the most and no instruction should have been given upon the subject, unless it were presented to the jury in such form and content as to require, first, a finding by them favorable to the contention of appellants, and, of course, the proposed instructions utterly fail to do this, so the

trial court was entirely justified in refusing to give such proposed instructions. These proposed instructions were tied to one another.

It does not seem to appellees necessary to cite any further authority for this proposition, as the same is fundamental.

Trial Court's Instructions on Contributory Negligence, Assumption of Risk and Unavoidable Accident Were Proper

Again, viewing the evidence, as referred to in appellees' counter statement of the case, under the subheading *Causes of Appellant Rose Wong's Fall,* the Court was entirely justified, when requested, to give the instructions it did on these legal propositions in view of all the combinations of evidence and the legitimate inferences drawable therefrom.

It is fundamental that a party is entitled to have his theory of the case presented to the jury by proper instruction if there is any evidence to support the theory. *Getzendaner v. United Pacific Insurance Company,* 152 Wash. Dec. 28, 322 P. (2d) 1089.

All that appellees can say is that there were sufficient combinations of evidence and reasonable inferences to furnish a sufficient basis for any one of said three instructions which appellants argue should not have been given.

Appellants do not contend that the instructions given on contributory negligence, assumption of risk and un-

avoidable accident are incorrect statements of the law (see Opening Brief of Appellants at page 37), and no contention is made that these issues were not posed in the pleadings or pretrial order, as appellants' opening brief at page 37 states that all three appeared in the pretrial order and that all three were applicable to the issues framed thereby, so there is no argument that they are not correct statements of the law or were not applicable to the issues framed in the case.

Their contention is that there is nothing, as a matter of law, in the evidence to lay a basis therefor (see Opening Brief of Appellants at page 38). This argument or statement is not amplified; appellants merely make the statement but do not argue or explain why or how there is no basis for any one of said instructions.

Jury's Question Was Not a Part of Verdict or Returned Therewith

The question referred to in appellants' opening brief, at page 26 thereof, was not attached to the verdict (R. 42).

The affidavit, which is uncontradicted in any respect, appearing in the Record at pages 41-42, states that the yellow piece of paper, which is the question referred to by appellants, was handed to the bailiff 45 minutes before the jury returned its verdict, so that the same is no part of the verdict and is not connected therewith. Obviously, therefore, any consideration by the jury of the matter

contained in or referred to in said yellow piece of paper, was resolved by the jury's verdict, which is independent and separate and was returned later.

Appellants argue that in some manner or other this demonstrates that the jury misunderstood or was confused and that the verdict and the question are in irreconcilable conflict. The latter part of the argument has been answered above, and with respect to the former part of the argument, it seems to appellees that it is an attempt to impeach the verdict and, if it is such an attempt, it is fundamental that it cannot be accomplished in this manner. Whatever the jury may have considered, even though misunderstood, if such were actually the case, the same inheres in the verdict and cannot impeach it. 53 AM. JUR., Trial, §1105 et seq.

Since appellants raised the issue in their motion to set aside the verdict or for a new trial (R. 36-37), without any supporting affidavit or other evidentiary presentation, appellees felt it incumbent to serve and file an affidavit (R. 41-42), which remains uncontradicted in the record, to the effect that the yellow piece of paper of a question occurred 45 minutes before the jury returned its verdict and was no part of it and not connected therewith.

There remains only one possible topic involved in appellants' opening brief, viz., they say that appellees were bound to furnish a safe ladder and what is meant by that term. The standard is a reasonably safe ladder (R. 29),

as the pretrial order states that the issue as to the ladder was that appellants had to prove that it was not a safe ladder for the use for which it was intended and furnished, according to the standard of the law of the State of Washington (R. 29). That standard, of course, is reasonably safe. *Hoffman v. American Foundry Company,* 18 Wash. 287, 289, 51 Pac. 385, 386; *Le Claire v. Washington Water Power Co.,* 83 Wash. 560, 566, 145 Pac. 584, 586; *Griffith v. Washington Water Power Co.,* 102 Wash. 78, 80, 172 Pac. 822, 823; *Haines v. Coastwise Steamship & Barge Co.,* 104 Wash. 685, 689, 177 Pac. 648, 649; *Steven v. Hines,* 110 Wash. 579, 586, 188 Pac. 917, 920; *Friermood v. Oregon-Washington R. & N. Co.,* 134 Wash. 178, 180, 235 Pac. 17, 18; *Wehtje v. Porter,* 183 Wash. 177, 179, 48 P. (2d) 212; *Cantrill v. American Mail Line,* 42 Wn. (2d) 590, 597, 257 P. (2d) 179, 183.

Respectfully submitted,

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